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BRIEF
SUPREME COURT U.S.
No. 204

In the Supreme Court of the United States

October Term, 1965

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT A. FLEISCHER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

DUDLEY A. PATTESON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the District of Kansas, dismissing the indictment for lack of venue.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, pp. 1a-6a) has not yet been reported. The opinion of the district court (R. 6-8) is reported at 132 F. Supp. 67.

JURISDICTION

The judgment of the court of appeals was entered January 19, 1956 (App. *infra*, p. 7a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether venue of the crime of failing or neglecting to obey an order of a local draft board to a conscientious objector to report for civilian work pursuant to Section 6(j) of the Universal Military Training and Service Act lies in the district where the work was to be performed or in the district where the registrant told his local board that he would refuse to report.

STATUTE INVOLVED

The pertinent portions of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 65 Stat. 75, provide:

Section 6(j) of the Act (50 U.S.C. App. 456(j)):

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any

such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * *

Section 12(a) of the Act (50 U.S.C. App. 462(a)):

* * * Any * * * person * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

An indictment returned in the United States District Court for the District of Kansas charged that petitioner, having been classified I-O [conscientious objector opposed to non-combatant service] by his local board in Oklahoma, had been mailed an order directing him to report on July 26, 1954, for civilian work, and that he knowingly and willfully refused, neglected and failed to report at the Topeka State Hospital [in Kansas] at the time and place designated in that order (R. 1).

The Kansas district court *sua sponte* ordered the cause transferred under Rule 21(b), F. R. Crim. P.[1] to the Western District of Oklahoma, where defendant resided and where his draft board was located (R. 2). That court, however, retransferred the cause to the Kansas court on the ground that the jurisdiction of the offense was solely in Kansas (R. 3).

Respondent then moved in the Kansas court to dismiss the indictment for lack of venue. He alleged that he resided and that his draft board was located in Oklahoma; that, when he was finally ordered by his draft board to perform work at the Topeka State Hospital at Topeka, Kansas, he personally notified the board in Oklahoma that he would refuse to accept such employment; and that he never left the state of Oklahoma to report for the assigned work. Under these circumstances, he argued, the refusal to report to the hospital was an act committed in the Western District of Oklahoma, and not in Kansas (R. 3-4).

The Kansas district court dismissed the indictment, holding that venue of the crime was in Oklahoma rather than in Kansas (R. 6-9). Its order was affirmed on appeal (App. *infra*, p. 7a).

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[1] That rule provides:

"The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

REASONS FOR GRANTING THE WRIT

The opinion of the court below is in direct conflict with that of the Court of Appeals for the Third Circuit in *United States* v. *Johnston*, decided December 1, 1955, now before this Court on petition for a writ of certiorari (No. 643, this Term). The Third Circuit—applying the general rule that where there is a legal duty to act and the failure to do that act is a criminal offense courts consider the criminal offense to take place where the defendant failed to perform that which the law required of him—has held that the offense charged in this type of case is failure to report for civilian work, an offense which occurs at the place where the work is to be performed. In the instant case, the Tenth Circuit has held that no offense is committed at the place where the work was to be performed; but that the offense is completed when a defendant notifies his local draft board that he will not report for the work assigned.

This conflict of circuits is one which should be resolved in the interests of orderly administration of the selective service laws in this field. As the history of the transfer and retransfer of this case illustrates, there have been differences of opinion among district courts on this issue. See also *United States* v. *Sutter*, 127 F. Supp. 109 (S. D. Cal.). In view of the present conflict, the doubt as to the district in which to bring this type of prosecution remains unresolved. At present, about twenty-five prosecutions have been held in abeyance pending determination of the issue. In addition, the question is important for future cases of the same type which may arise.

Despite the manifest practical advantages of bringing a prosecution in the district where the draft board is located, it has been the view of the Department of Justice that prosecution had to be brought in the district where the work was to be performed. As this Court said in *United States* v. *Anderson*, 328 U. S. 699, 704-705, with respect to the venue requirement of the Sixth Amendment:

> The constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction.

While the exact situation presented by these cases was left open in the *Anderson* decision, the rationale of *Anderson* would appear to require that, where a registrant has appeared before his local board and has been given a work assignment, the failure to perform the duty required by the Act occurs at the place where the work is to be performed even though the registrant has announced that he will not comply with the order. Section 6(j) of the Universal Military Training and Serv-

ice Act speaks of one "who knowingly fails or neglects" to obey an order to report for civilian work; the word "refuse" does not appear, although Section 12(a) provides for the punishment of one "who in any manner shall knowingly fail or neglect or refuse" to perform a duty required under the Act. Failure or neglect to obey an order to report for civilian work does not occur until the work is to begin, and then it occurs at the place the work is to be performed.

More basic than the absence of the word "refuse" or "refusal" in Section 6(j), is the fact that this indictment charged a failure to report for work as ordered. There is no violation of the duty to report until the defendant fails to appear at the place of work. If a registrant fails to report to his board to receive his work assignment, there would then be a violation of a duty to report which would occur in the district where the draft board is located. However, in a prosecution for violation of that duty, the registrant would not be in a position to challenge the draft board classification since he would not have completed the administrative process. *Falbo* v. *United States*, 320 U.S. 549. Where he does report, receives his assignment and says nothing, but then does not appear at the place of work, the offense of failing or neglecting, or even refusing, to report for work clearly occurs only at the place of assignment. Nor should the situation be altered where the registrant tells his draft board that he will not appear on the day specified. If, after telling his draft

board he will not appear, he changes his mind and reports, he has not committed the offense of failing or refusing to report for work. The violation of the duty to report for work does not occur until he fails to appear as ordered; his statement to the draft board is merely a statement of future intention.

The present situation with respect to civilian work is different from that prevailing during World War II when civilian camps were utilized. Then, the regulations provided that the registrant was to report to the local board for transportation to a camp, and the board was to furnish him with government travel requests (Selective Service Regulations 652.12, 7 Fed. Reg. 112). When, therefore, the registrant reported to the board and refused to do more, his act was the same as refusing to submit to induction, and he could properly be prosecuted in the district of refusal. *Dodez* v. *United States*, 329 U. S. 338. That case, however, does not as the court below thought (App. p. 5a) control the present situation where the registrant is expected to make his own arrangements to report to the place assigned; and is charged with a failure to report as ordered. Under these circumstances, the duty in question is to report for work, and the violation therefore takes place where the work was to be performed.

CONCLUSION

In view of the conflict between the decision below and that of the Third Circuit in *United States* v. *Johnston*, No. 643, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

FEBRUARY 1956.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5193—November Term, 1955

Appeal from the United States District Court for the District of Kansas

UNITED STATES OF AMERICA, APPELLANT

v.

DUDLEY A. PATTESON, APPELLEE

(January 19, 1956)

Selby S. Soward (William C. Farmer, U. S. Attorney, was with him on the brief), for Appellant;

Hayden C. Covington, for Appellee.

Before MURRAH, and PICKETT, Circuit Judges, and RICE, District Judge.

PICKETT, Circuit Judge.

The question presented by this appeal is one of jurisdiction in a prosecution for violation of the provisions of the Universal Military Traning and Service Act. (50 U.S.C.A. App. Sec. 451 et seq.) The defendant Patteson, a resident of Oklahoma City, Oklahoma, registered with the local Selective Service Board and was classified 1-0. This classification is one designated for those who are conscientiously opposed to participation in both com-

batant and noncombatant training and service in the armed forces of the United States. 50 U.S.C.A. App. Sec. 456(j). In lieu of induction, the local board ordered Patteson to report to it on July 26, 1954, to receive instructions for civilian work contributing to the maintenance of the national health, safety or interest at the Topeka State Hospital in Topeka, Kansas. In compliance with the order, he reported to the local board and there notified the board that he would not proceed to Topeka for the performance of the required civilian work. He never left the State of Oklahoma.

On October 7, 1954, the defendant was indicted in the United States District Court for the District of Kansas for violation of 50 U.S.C.A. Sec. 462. The indictment charged that the defendant did knowingly and willfully refuse, neglect and fail to report to the Topeka Hospital as ordered by the local board. The District Court dismissed the indictment on the ground that the offense was not committed in Kansas. 132 F. Supp. 67. The United States has appealed.

Section 12 of the Act (50 U.S.C.A. Sec. 462(a)) provides that any person "charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment." The Sixth Amend-

ment to the Constitution of the United States requires that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial "by an impartial jury of the State and district wherein the crime shall have been committed, * * *." The question narrows itself to that of where was the crime committed. The United States argues that the order of the local board required Patteson to report at the Topeka Hospital; that his omission or failure to report there was the act which constituted the violation; and that the crime was committed in Kansas by this omission or failure. It relies upon decisions which uphold jurisdiction of prosecutions in the districts where a statute requires an act to be done.[2] Generally, these cases hold that when an omission or failure to act constitutes a crime, the jurisdiction of a prosecution for a violation is in the district where the act should have been performed, even though the person charged was not physically present in that district at the time of the omission or failure. The Third Circuit in United States v. Johnston, —— F. 2d ——, adopted this analogy and held in a case similar to the one before this court that jurisdiction was at the place where the conscientious objector was ordered to report. We do not think that the offense was an act of omission or an offense of misfeasance or malfeasance which would pass from

[2] See Rumely v. McCarthy, 250 U.S. 283; United States v. Lombardo, 241 U.S. 73; United States v. Commerford, 2 Cir., 64 F. 2d 28, cert. den. 289 U.S. 759; N. Y. Central and H.R.R. Co. v. United States, 2 Cir., 166 F. 267; State v. Peabody, 25 R.I. 54, 56 Atl. 1028.

one jurisdiction to another, but a refusal to take a positive step in the process of induction or assignment to civilian work and that this refusal was in Oklahoma.

As is pointed out in United States v. Anderson, 328 U. S. 699, "The constitutional specification is geographic; and the geography prescribed in the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction." (footnotes omitted).

So far as compliance with the requirements of the Act or the regulations is concerned, the conscientious objector is in no different position than any other person subject to its provisions. Induction into the service is the end product of submission to the Selective Service process and compliance with the orders of the local board. Billings v. Truesdale, 321 U. S. 542. Induction is brought about by a continuous process of steps beginning with registration, and it ends when the registrant is accepted into the military service or enters into civilian work. A wilful refusal of those affected by the Act to take any one of the necessary steps constitutes a violation. Gibson v. United States, 329 U. S. 338; Billings v. Truesdale, supra; Falbo

v. United States, 320 U. S. 549; Hudson v. United States, 10 Cir., 157 F. 2d 782, cert. den. 329 U. S. 813; Shigeru Fujii v. United States, 10 Cir., 148 F. 2d 298, cert. den. 325 U. S. 868; Berman v. United States, 9 Cir., 156 F. 2d 377, cert. den. 329 U. S. 795.

Patteson had taken all the required steps in the process of induction up to compliance with the local board's order which required him to report to it for assignment to Topeka, Kansas for civilian work in lieu of induction into the armed forces. The duty required of him by the order was to proceed to Topeka. This was no more than a necessary intermediate step in the continuous process, the ultimate purpose of which was to get Patteson into civilian work. Falbo v. United States, supra. It seems to us quite clear that his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further. Had he proceeded to Topeka and then refused to do the assigned work, a separate offense would have been committed. Gibson v. United States, supra; United States v. Anderson, supra. In Dodez v. United States, 329 U. S. 338, and Jeffries v. United States, 10 Cir., 169 F. 2d 86, prosecutions were had in the district where the board was located when the registrants refused to report for work of national importance after being ordered to do so, and the jurisdiction of the courts was not questioned.[3]

[3] In the Jeffries Case, the court said:

"Clearly, the duty of Jeffries to report embraced more than putting in an appearance at the time and place designated in

Jurisdiction as contended for by the United States might require a conscientious objector who refused to obey the local board's order to go to a distant state or territory of the United States, or even outside the continental limits of the United States, where he had never been, to defend a prosecution for an act, that is a refusal to proceed, which occurred in his home district. This, of course, would not determine jurisdiction if the crime was actually committed elsewhere, but as was said in United States v. Johnson, 323 U. S. 273, "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

Affirmed.

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the order. It included a willingness to be assigned to work of national importance under civilian direction and to go to the camp to which he had been assigned.

"The appearance of Jeffries at the office of the Local Board at the time indicated in the order with the intent and purpose not to accept assignment to work of national importance and not to go to the camp to which he had been assigned was as much a noncompliance with the order as if he had not appeared at the office of the Local Board."

JUDGMENT

Forty-third Day, November Term, Thursday, January 19th, 1956.

Before Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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